RECENT CASES

Antitrust Law—

SECTION 7 OF THE CLAYTON ACT APPLIED TO VERTICAL ACQUISITIONS AND HELD TO ENCOMPASS ACQUISITIONS WHICH WHEN MADE DID NOT HAVE THE EFFECT OF SUBSTANTIALLY LESSENING COMPETITION

E. I. du Pont de Nemours & Company purchased twenty-three per cent of the common stock of General Motors Corporation during the period 1917 to 1919.[1] At the time of suit General Motors purchased two-thirds of its paint and two-fifths of its fabric requirements from du Pont.[2] The Justice Department brought suit in equity against du Pont in 1949, alleging, *inter alia*,[3] that the stock acquisition resulted in a violation of section 7 of the Clayton Antitrust Act.[4] The district court dismissed the action.[5] On direct appeal[6] the Supreme Court reversed in a four-two decision.[7] Limiting the applicable market to finishes and fabrics for the automobile industry,[8] the Court found that du Pont's twenty-three per cent stock holding gave it sufficient influence to enable it to compel General Motors to purchase these products solely from du Pont.[9] Although the lower court

1. At that time, du Pont was beginning to diversify from the manufacture of explosives; General Motors was one of the comparatively small automobile manufacturers competing for the market left by the dominant Ford Motor Company. Brief for Appellees, p. 284, United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586 (1957).

2. Instant case at 596. As to the paint sales, this amounted to four-fifths of du Pont's total sales of the products involved. Instant case at 605.

3. It was alleged that defendant also had violated §§ 1 and 2 of the Sherman Act, 26 STAT. 209 (1890), as amended, 15 U.S.C. §§ 1, 2 (1952). These formed the main thrust of the government's complaint and briefs in both courts. The district court held that the Government had failed to prove a conspiracy to restrain trade, 126 F. Supp. 235, 335 (N.D. Ill. 1954), and the Supreme Court rested its decision wholly on the Clayton Act count.

4. 38 STAT. 731 (1914), (later amended by 64 STAT. 1125 (1950), 15 U.S.C. § 18 (1952)). However, this suit is governed by the section as it existed prior to amendment, since the latter applies, by its terms, only to acquisitions subsequent to its enactment. *Ibid.*

5. 126 F. Supp. 235 (N.D. Ill. 1954).

6. Direct appeal is permitted under § 2 of the Expediting Act, 32 STAT. 823 (1903), as amended, 15 U.S.C. § 29 (1952).

7. Justices Clark, Harlan and Whittaker did not participate in the decision.

8. Instant case at 594.

9. It has been indicated that the control requirement for § 7 is satisfied by the ability of the acquirer to elect one member of the board of directors of the acquired corporation. Hamilton Watch Co. v. Benrus Watch Co., 114 F. Supp. 307, 315 (D. Conn.), *aff'd*, 206 F.2d 738 (2d Cir. 1953). In the instant case, five members of the thirty-man General Motors board were alleged to be du Pont nominees. Brief for Appellants, p. 156, United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586 (1957).

had decided that thirty years of non-exclusive dealing negated any threat that du Pont would exercise any control it might have,[10] the Supreme Court held that du Pont had achieved its present sales position through this influence,[11] and that this fact indicated a reasonable probability that du Pont might exercise its full influence, foreclosing the General Motors market from its competitors.[12] *United States v. E. I. du Pont de Nemours & Co.*, 353 U. S. 586 (1957).

Section 7 is a preventive measure the purpose of which is to arrest the creation of monopolies and restraints on competition before they have been consummated.[13] It prohibits the acquisition by a corporation of ". . . the whole or any part of the stock . . . of another corporation . . . where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain . . . commerce in any section or community, or tend to create a monopoly of any line of commerce." [14] A reasonable probability that the acquisition will result in a lessening of competition to a substantial degree has been held sufficient to constitute a violation of this section.[15] Until the instant case all reported adjudications under the section[16] have involved horizontal acquisitions, *i.e.*, between companies offering competing goods.[17] In these cases proof

10. 126 F. Supp. 235, 335 (N.D. Ill. 1954).

11. Instant case at 603.

12. Instant case at 607. The dissent disagreed with the majority on its determination of the relevant market, *id.* at 648, that du Pont's 23% stock holding was sufficient to enable du Pont to force General Motors to buy products solely from du Pont, *id.* at 610, and that a reasonable probability of foreclosure existed, *id.* at 646.

13. S. REP. No. 698, 63d Cong., 2d Sess. 1 (1914).

14. 38 STAT. 731 (1914), (later amended by 64 STAT. 1125 (1950), 15 U.S.C. § 18 (1952)). This section as amended read as follows: "No corporation engaged in commerce shall acquire . . . the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly." *Ibid.*

15. International Shoe Co. v. FTC, 280 U.S. 291, 298 (1929). *Cf.* Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 357 (1921); Transamerica Corp. v. Board of Governors, 206 F.2d 163, 170 (3d Cir.), *cert. denied*, 346 U.S. 901 (1953).

16. In a private action for treble damages, a district court has applied § 7 to the acquisition by a rayon converter of a rayon manufacturer. Ronald Fabrics Co. v. Verney, CCH TRADE REG. REP. (1946-47 Trade Cas.) ¶ 57514 (S.D.N.Y. 1946). In Fargo Glass & Paint Co. v. Globe Am. Corp., 201 F.2d 534 (7th Cir.), *cert. denied*, 345 U.S. 942 (1953), the court determined that the acquisition by a selling agent of 40% of the stock of a stove manufacturer did not substantially affect competition. However, Mr. Justice Black, in his dissent in Ford Motor Co. v. United States, 335 U.S. 303 (1948), argues that the section should apply to Ford's acquisition of stock in a finance company. *Id.* at 326.

17. Horizontal acquisitions involve corporations which offer the same or similar products or services, or products or services which can be substituted for each other. Vertical acquisitions involve corporations which stand in a supplier-customer relation to each other. Conglomerate acquisitions include all those which can neither be classified as horizontal or vertical. See Bock, *Economic Patterns in Merger Cases*, in CONFERENCE BOARD, ECONOMIC CONCENTRATION MEASURES: USES AND ABUSES 35, 37 (1957).

of substantial lessening of competition has required a showing that substantial competition had existed between the corporations previous to the acquisition.[18] While the share of the relevant market held by the merging companies has not been determinative of substantiality,[19] in the nationally advertised watch industry, for example, a combined market share of twenty per cent has been held to satisfy the requirement of substantiality of prior competition.[20] The instant Court, in making the initial appellate application of section 7 to vertical acquisitions,[21] found the requirement of previous competition prevailing in cases of horizontal acquisitions to be inappropriate.[22] The Court, applying the standard developed under section 3 of the Clayton Act, which outlaws exclusive dealing contracts where the result may be to "substantially lessen competition or tend to create a monopoly in any line of commerce," [23] held that a vertical acquisition violates section 7 whenever there is a reasonable probability that it will foreclose competition in a substantial share of a market of substantial size.[24]

Since one of the results of stock acquisitions proscribed by the section is the substantial lessening of competition between competing corporations,[25] the Court might have limited the applicability of the entire section

18. Transamerica Corp. v. Board of Governors, 206 F.2d 163, 168 (3d Cir.), *cert. denied,* 346 U.S. 901 (1953).

19. One recent Clayton Act case has held that the requirement of substantial lessening of competition can be met merely by proving that the defendant's share of the market was substantial. Standard Oil Co. v. United States, 337 U.S. 293, 314 (1948); see REPORT OF THE ATTORNEY GENERAL'S COMMITTEE TO STUDY THE ANTITRUST LAWS 141-42 (1955) (hereinafter cited as REPORT). However, this case involved exclusive dealing contracts under § 3 of the Clayton Act, and it is generally believed that the "quantitative substantiality" test cannot alone be sufficient to establish a violation of § 7. Transamerica Corp. v. Board of Governors, 206 F.2d 163, 170 (3d Cir.), *cert. denied,* 346 U.S. 901 (1953). Sometimes, however, the market share foreclosed may be so large as to establish a violation by the existence of this one factor alone. See REPORT, at 122.

20. Hamilton Watch Co. v. Benrus Watch Co., 114 F. Supp. 307 (D. Conn.), *aff'd,* 206 F.2d 738 (2d Cir. 1953).

21. See notes 16 and 17 *supra.*

22. Instant case at 595.

23. 38 STAT. 731 (1914), 15 U.S.C. § 14 (1952).

24. See Standard Oil Co. v. United States, 337 U.S. 293, 314 (1949); Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 357 (1922). Of the three proscribed results of § 7, it might seem that substantial lessening of competition is a more inclusive proscription than either restraint of trade or tendency to create a monopoly. And, since the statute proscribes the first result only where competition is lessened between the acquired and the acquiring corporations, it might seem that this standard could have no application in the instant case. However, the Court, in accordance with dicta in Transamerica Corp. v. Board of Governors, 206 F.2d 163, 170 (3d Cir.), *cert. denied,* 346 U.S. 901 (1953), equated the three phrases. The rationale behind this is apparently that a substantial lessening of competition will bring a company appreciably closer to monopoly power. See REPORT, at 124.

25. See text at note 14 *supra.* Courts have recognized that the section proscribes three separate results, only one of which requires competition between the corporations previous to acquisition. Swift & Co. v. FTC, 8 F.2d 595, 597 (7th Cir. 1925), *rev'd on other grounds,* 272 U.S. 554 (1926). However, even in the same circuit, courts have previously differed over whether the ban applies only to competing companies. *Compare* Aluminum Co. v. FTC, 284 Fed. 401, 407 (3d Cir. 1922), *cert. denied,* 261 U.S. 616 (1923), *with* Transamerica Corp. v. Board of Governors, 206 F.2d 163 (3d Cir.), *cert. denied,* 346 U.S. 901 (1953).

to acquisitions between competing corporations.[26] However, the Court's construction of the statutory language appears reasonable.[27] Conceding that a reasonable construction of section 7 afforded the instant Court a choice of whether or not to include vertical acquisitions within its proscription, the Court's interpretation seems justified from a policy standpoint.[28] If vertical acquisitions can have the effect of substantially lessening competition, then the policy of the antitrust laws would seem to dictate that the Court construe the statute to include that practice. Such a situation is not difficult to envision. In the case of a manufacturer who purchases a firm for whose business he formerly competed, he can then compel this erstwhile free agent to buy all its requirements from the acquiring firm, thus excluding the manufacturer's competitors from this part of the possible market.[29] If

26. Any ambiguity has been removed by the 1950 amendment, which makes the inclusion of non-competing acquisitions clear. H.R. REP. No. 1911, 81st Cong., 1st Sess. 11 (1949). Therefore, this holding effects only those acquisitions which took place prior to 1950. For text of new section, see note 14 *supra*.

27. Emphasizing that the first paragraph of Section 7 is written in the disjunctive, see note 14 *supra*, the Court concluded that "not only the corporate acquisition of stock of a competing corporation" is embraced, "but also the corporate acquisition of stock of any corporation, competitor or not, where the effect may be either (1) to restrain commerce in any section or community, or (2) tend to create a monopoly of any line of commerce." Instant case at 590-91. Legislative history is not helpful in deciding whether the section covers acquisitions in companies which do not make the same products, since the only congressional mention of non-competing corporations came in connection with an early draft, amended before passage. 51 CONG. REC. 14419 (1914). It is true, as the dissent argues, that this is the first § 7 proceeding instituted by the Government which involves companies not offering competing products, instant case at 615. However, this evidence of administrative interpretation is not persuasive, since the record for the seven years since the amendment making clear the inclusion of these acquisitions is similarly devoid of actions against non-horizontal acquisitions. See Markham, *Merger Policy Under the New Section 7: A Six Year Appraisal*, 43 VA. L. REV. 489, 513 (1957). Applying the section to vertical acquisitions is, however, in conflict with the FTC's ruling. FTC, ANNUAL REPORT 6-7, 60 (1929). Section 7 was amended in 1950. 64 STAT. 1125 (1950), 15 U.S.C. § 18 (1952), text at note 14 *supra*. The amendment makes clear the inclusion of vertical acquisitions which take place after the date of the amendment. H.R. REP. No. 1911, 81st Cong., 1st Sess. 11 (1949).

28. For a discussion of the economic aspects of vertical integration, see Adelman, *Integration and Antitrust Policy*, 63 HARV. L. REV. 27 (1949); Hale, *Vertical Integration*, 49 COLUM. L. REV. 921 (1949). Although § 7 applies only to integration by acquisition rather than by internal expansion, there appears to be a rational basis for this distinction. Building a new facility results in a greater total productive capacity, which increases competition and generally can be said to benefit the public by intensifying the drive towards product improvement and cost reduction. On the other hand, the acquisition of a facility which is already competing in the market cannot result in this collateral benefit. Some early cases under § 7 applied the Sherman Act "rule of reason" and required proof that the acquisition was against the public interest. *E.g.*, United States v. Republic Steel Corp., 11 F. Supp. 117 (N.D. Ohio 1935). However, this contention was laid to rest under § 3 of the Clayton Act (involving exclusive dealing contracts and using the same standard as § 7) by Standard Oil Co. v. United States, 337 U.S. 293, 311 (1949). The latter case held that Congress had expressed its legislative determination that such contracts were against the public interest. Neither of the briefs in the instant case mention the argument.

29. Of course, in the instant case, du Pont had to offer its goods to General Motors at competitive prices. Otherwise an independent General Motors shareholder might bring an action against his directors for failure to act in the best interests of the corporation. See Geddes v. Anaconda Copper Mining Co., 254 U.S. 590 (1921). However, even if price, service, and quality were equal among all the suppliers, du Pont could force General Motors to purchase the major portion of its requirements, thereby foreclosing du Pont's competitors from this segment of the market.

the acquired firm represented a substantial portion of the market for these competitors' products, then the acquisition would have the proscribed result. This construction has the further advantage of bringing within the compass of the antitrust laws anti-competitive transactions difficult to reach under other provisions. Vertical acquisitions are not per se violations of the Sherman Act.[30] Therefore, it has been necessary in order to make out a Sherman Act violation to prove either a conspiracy,[31] a virtual monopoly [32] or an intent to monopolize,[33] none of which encompass the risks to competition existing in transactions like that of the instant case. Nor are such risks within the Clayton Act's restriction in section 3 on exclusive dealing arrangements,[34] which have a competitive impact similar to that of vertical acquisitions. Finally, the instant decision, by bringing vertical acquisitions within the same standard as is applied to exclusive dealing arrangements, avoids the paradoxical result that would permit a firm to legally control more of a market by acquisition than by contract where the object of both is to secure a constant demand at the expense of the firm's competitors.[35]

The Court's holding that the legality of an acquisition [36] may be measured by subsequent events is not compelled by the language of section 7.[37] Although another portion of the Clayton Act seems to contemplate a deter-

30. 26 STAT. 209 (1890), as amended, 15 U.S.C. §§ 1, 2 (1952). United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948).

31. Alexander Milburn Co. v. Union Carbide Corp., 15 F.2d 678 (4th Cir. 1926). The district court in the instant case found no evidence of conspiracy. 126 F. Supp. 235, 334 (N.D. Ill. 1954).

32. In United States v. Aluminum Co., 148 F.2d 416, 424 (2d Cir. 1945), Judge Learned Hand said that 90% of the relevant market was sufficient, but doubted that 64% was. In the instant case, du Pont was represented as having about 25%.

33. United States v. Columbia Steel Co., 334 U.S. 495 (1948). The court in the instant case found no such intent. Instant case at 607.

34. 38 STAT. 731 (1914), 15 U.S.C. § 14 (1952). See Standard Oil Co. v. United States, 337 U.S. 293 (1949). In the instant case, there was no exclusive dealing agreement between du Pont and General Motors.

35. It has been held that exclusive dealing contracts affecting 40% of the market are struck down by the Clayton Act, Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346 (1922), but where size is the only offense, acquisition of other companies has not been deemed illegal unless defendant had a virtual monopoly. United States v. Aluminum Co., 148 F.2d 416, 424 (2d Cir. 1945). See note 32 *supra.*

36. The Court's holding is not limited to vertical acquisitions. Its reasoning applies equally to horizontal, vertical and conglomerate transactions. In the instant case the acquisition was in part conglomerate, because du Pont did not make paint in 1917. They did, however, manufacture a fabric which could be used in automobiles. In Transamerica Corp. v. Board of Governors, 206 F.2d 163 (3d Cir.), *cert. denied,* 346 U.S. 901 (1953), bank acquisitions were upheld because the banks were not in substantial competition. Should the situation in banking change, making the relevant market the five-state area for which the Government argued, there would then appear to be a violation on the basis of the holding in the instant case.

37. The wording of the section seems to indicate that acquisition is the offense, which would mean that the test should be whether there was substantial lessening of competition at the time of the acquisition. See text at note 14 *supra.*

Most actions have heretofore been brought at or near the time of purchase. Instant case at 598. See Transamerica Corp. v. Board of Governors, 206 F.2d 163 (3d Cir.), *cert. denied,* 346 U.S. 901 (1953). However, the Government's action for antitrust violations is subject to neither statute of limitations nor to laches. Dissent in instant case at 622.

mination of legality by hindsight,[38] section 7 itself might equally well have been interpreted to require measurement against conditions contemporary with the transaction. Such a view would still accord with the purpose of the Clayton Act to nip incipient monopolies[39] and would also have the merit of relative certainty. Corporations contemplating an acquisition would be able to predict with some assurance whether the given transaction would contravene permissible limits, contrary to the instant rule which requires either a forebearance of acquisition or an attempt to predict what course the companies and the markets involved may take in future years. Although in either case an acquisition of customer, supplier or competitor would be suspect, under the Court's rule any acquisition may be a potential violation.[40] Aside from the future impact of the instant case, the Court's position also calls into question other acquisitions made in the past. An evaluation of the Court's choice of alternatives in construing section 7 must, therefore, depend on the retroactive and prospective effects of that choice.

In threatening all acquisitions which have taken place since 1914, regardless of the size of the companies at the time of the acquisition so long as they now have a substantial segment of the market, the instant case would appear to make an arbitrary distinction between corporations of equal size and economic power.[41] Those corporations whose growth by acquisition occurred prior to 1914[42] or whose subsequent growth has occurred through internal development are to be judged by the less rigorous Sherman Act test, while those whose growth has occurred through acquisitions since 1914 are to be subject to the Clayton Act standard. However, regardless of the justifiability[43] of the distinction, its practical impact is slight. As a result of an early determination by the Supreme Court that section 7 did not apply to acquisition of assets, but only to share capital,[44] many corporations arranged their post-1914 transactions so as to involve only an exchange of assets.[45] In other cases assets have subsequently been

38. The third paragraph of § 7 exempts investment purchases, but removes the exemption where the stock is subsequently used to control. 38 STAT. 732 (1914), 15 U.S.C. § 18 (1952).

39. S. REP. No. 698, 63d Cong., 2d Sess. 1 (1914).

40. Purchase for investment, without use to control, remains a defense under both the new and the old sections. 38 STAT. 732 (1914), 15 U.S.C. § 18 (1952).

41. See Note, 66 YALE L.J. 1251 (1957).

42. Many of the presently large corporations have made few acquisitions since 1914. FTC, REPORT ON THE MERGER MOVEMENT 23 (1948).

43. It is true that the result of the instant case is to create a distinction which cannot be completely justified. See Note, 66 YALE L.J. 1251 (1957). However, the Court must apply the statute as it finds it and cannot refuse to adopt an interpretation of it which it believes otherwise necessary solely on the grounds that the result is a distinction which it would not have made as a legislative body. There remains the possibility that Congress will be galvanized into action by the instant case in order to equalize the present disparity.

44. Thatcher Mfg. Co. v. FTC, 272 U.S. 554, 561 (1926).

45. *E.g.*, United States v. Columbia Steel Co., 334 U.S. 495 (1948). The 1950 amendment includes purchase of assets. However, by its terms, it applies only to acquisitions after its enactment. 64 STAT. 1125 (1950), 15 U.S.C. § 18 (1952). See note 14 *supra*.

transferred from the acquired company, and any attempt at reaching the past transaction would be fruitless.[46] Moreover, the reluctance of courts to order the harsh remedies of divorcement, divestiture or dissolution,[47] together with the fact that in any event few if any other corporate situations resemble in magnitude the du Pont-General Motors relation[48] serve further to limit the retrospective significance of the instant case.[49]

The effect upon contemplated acquisitions, however, may be more important. No corporation can henceforth be certain when planning an acquisition that corporate growth may not retroactively make the acquisition a violation of section 7, forcing a possible divestment with its accompanying waste. While it is recognized that the *du Pont* doctrine provides a means of reaching concentrations of economic power which may in fact be harmful and which are not subject to other antitrust provisions,[50] the countervailing consideration would appear to be whether the decision also inhibits investment that would contribute to the growth and well-being of the economy. Though the question is not subject to a categorical answer, a number of generalizations appear possible with respect to certain types of corporations making certain investments. For example, well diversified corporations controlling a substantial share of the market in which they sell or constituting a substantial share of the markets in which they buy may well be deterred from further growth and diversity through large acquisi-

46. See United States v. Schenley Industries, Inc., Civil No. 1686, D. Del. The action was instituted in February, 1955 and complained of the acquisition by Schenley of controlling stock interest in one of its prominent competitors, Park & Tilford Distillers Corp. By the time a consent decree was entered in April, 1957, Park & Tilford was a mere shell, since the foreign suppliers for whom it had acted as agent had cancelled their agreements, supposedly to give them to Schenley. The consent decree could not require divestment; it only prohibited Schenley from acquiring any alcohol concerns for ten years unless it applied to the Attorney General for his approval. See H.R. REP. No. 486, 85th Cong., 1st Sess. 6 n.3 (1957).

47. In more than 60 years of Sherman Act history, only twenty-four cases have ordered one of these three measures of relief. H.R. REP. No. 486, *supra* note 46. This attitude is reflected in United States v. American Can Co., 230 Fed. 859, 904 (D. Md. 1916): "A dislike for useless waste and destruction makes one loath to follow the authority which may be understood as requiring the breaking up of defendant's organization, in spite of its proven power for good, albeit with serious possibilities for evil."

48. In 1955, General Motors ranked first in sales and second in assets of the nations industrial firms; du Pont was tenth and fourth respectively. Fortune Directory of the 500 Largest United States Industrial Corporations, July 1956, p. 2.

49. Relevant to these considerations is the introduction into the last session of Congress of House Bill No. 7698, which would amend § 7 by requiring previous notification to the Attorney General and the Federal Trade Commission of all mergers involving total capital, surplus and undivided profits of over ten million dollars, with certain exceptions. Both corporations involved must give all the following information which is within their knowledge or control: nature of the business; products or services sold or distributed; total assets; net sales for the past year; and location of plants or trading areas. The acquisition cannot go forward until 60 days after the report is in the Government's hands. Failure of either of the agencies to act or to request more information does not waive their right to bring an action at some later time. In addition, the amendment would give the Federal Trade Commission the power to seek an injunction prior to the transaction, a power now held only by the Justice Department. The bill was passed by committee, but never passed the House. See H.R. REP. No. 486, 85th Cong., 1st Sess. 6 n.3 (1956).

50. See text at notes 30-34 *supra*.

tions.[51] Particularly will this be so if the organization to be acquired is actually, or is capable of being, a customer, supplier or competitor.[52] Even in the case of conglomerate acquisitions, however, there should be reticence because of the possibility that a minimum of additional growth may suffice to place the acquired company in the position of a supplier or customer. Since it is likely that such corporations have attained or are close to optimum size in their particular fields, no particular economic advantage is to be gained by the public from their investment in other existing enterprises.[53] Even if optimum size is larger than its present size, benefits will probably not be passed on to the public since the corporation will be large enough to prevent market competition from materially diminishing price. But if such corporations are deterred from expansion by acquisition, they may attain the same ends by internal development. Building rather than buying, however, may require larger initial investment,[54] and at least with respect to horizontal and conglomerate development in static industries, will not be as attractive competitively.[55] If, nevertheless, the decision is made to build, the public gains in the short run from the addition of new and presumably more efficient productive facilities.

Corporations controlling small market shares should be little deterred by *du Pont,* even from making horizontal or vertical acquisitions. The remoteness of the time when they may reach the forbidden limit may assure them of a sufficient intervening profit to justify the risk of ultimate divestment. Meanwhile, these acquisitions may assist them in attaining optimum size with accompanying benefit to the economy. Moreover, if their acquisitions are conglomerate, the resultant diversity may serve to stabilize their operations which also should redound to the public's advantage. In balance, it would appear that the *du Pont* decision to view acquisitions from the standpoint of conditions prevalent at the time of suit should not have a serious inhibiting effect upon desirable investment.[56]

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51. Even if the market share held at the time of acquisition is not sufficient to make out a violation, little growth may be necessary before the share held can be called substantial.

52. This is especially important at this time when many corporations are experiencing, or have experienced, periods of diversification. For instance, du Pont has gone into many new fields, see BURSLER, THE DU PONT INDUSTRIAL GROUP 11-12 (1951), and would be hard put to find another firm which is neither a competitor nor a potential customer or supplier of its present operations.

53. See generally RELATIVE EFFICIENCY OF LARGE, MEDIUM-SIZED, AND SMALL BUSINESS 12-14 (T.N.E.C. Monograph No. 13, 1941).

54. Especially is this true where the transaction involves only the purchase of a portion of the acquired corporation's stock.

55. When the corporation builds a new plant, it increases the productive facilities of the industry. On the other hand, if it purchases an existing plant, it removes one facility with which it would have to compete.

56. It is recognized that the economic analysis presented is greatly simplified and does not take into account many important factors. However, its purpose is merely to indicate the type of considerations which seem to suggest that the instant case will not have a serious deterrent effect.

Congressional Investigations—

DUE PROCESS REQUIRES CONGRESSIONAL COMMITTEE TO FURNISH WITNESSES MORE PRECISE STATEMENT OF QUESTION UNDER INQUIRY THAN IS CONTAINED IN COMMITTEE AUTHORIZING RESOLUTION

Petitioner, a union official and labor organizer, was subpoened by a subcommittee of the House Committee on Un-American Activities. He testified freely concerning his own past communist affiliations but refused to answer questions concerning persons who had defected from the communist movement on the grounds that such questions were not relevant to the work of the committee. Petitioner was convicted in the district court for refusing to answer questions "pertinent to the question under inquiry," [1] and the circuit court affirmed.[2] On appeal, the Supreme Court reversed and remanded with instructions to dismiss the indictment, holding that the committee had denied petitioner due process by not adequately revealing to him the nature of the question under inquiry so that he could determine whether he was within his rights in refusing to answer. *Watkins v. United States,* 354 U.S. 178 (1957).[3]

Congressional need to gather information by investigation for use in the legislative process has been implemented by criminal sanctions against reluctant witnesses.[4] The relevant statute provides that a person summoned before a congressional committee who "refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor." [5] A witness may properly refuse to answer any question which is not pertinent to the subject under inquiry,[6] and the burden of proving pertinency is on the Government.[7] But a refusal to answer on these grounds has been, until the instant case, at the peril of the witness,[8] since questions not pertinent on their face could be proved at the trial to have

1. REV. STAT. § 102 (1875), as amended, 2 U.S.C. § 192 (1952). Prosecutions under this statute are handled by the Justice Department, but the witness may also be tried at the bar of the house of Congress conducting the inquiry. TAYLOR, GRAND INQUEST 231 (1955).

2. 233 F.2d 681 (D.C. Cir. 1956). The circuit court in affirming the conviction denied petitioner's contention that the subcommittee was acting solely for the sake of exposure and that the first amendment protected petitioner from being forced to reveal past political affiliations of his one-time associates. *Id.* at 686. For a discussion of these issues, see Comments, 10 ARK. L. REV. 210 (1956), 9 VAND. L. REV. 872 (1956), 42 VA. L. REV. 675 (1956).

3. Justice Frankfurter concurred in the result; Justice Clark dissented; Justices Burton and Whittaker took no part in the determination.

4. Limited immunity has also been granted witnesses before congressional committees to facilitate the gathering of information which might otherwise be withheld on the grounds that it was self-incriminating. Immunity Act of 1954, 18 U.S.C. § 3486 (Supp. IV, 1957).

5. REV. STAT. § 102 (1875), as amended, 2 U.S.C. § 192 (1952).

6. McGrain v. Daugherty, 273 U.S. 135, 176 (1927) (dictum).

7. Sinclair v. United States, 279 U.S. 263, 296 (1929) (dictum); United States v. Orman, 207 F.2d 148 (3d Cir. 1953).

8. Sinclair v. United States, 279 U.S. 263, 299 (1929) (good faith refusal to answer is no defense); United States v. Bryan, 72 F. Supp. 58, 64 (D.D.C. 1947).

been pertinent at the time of the hearing.[9] In delineating the scope of the "question under inquiry" for the purpose of determining pertinency of a particular question, courts have resorted to the resolution or statute authorizing the committee's jurisdiction.[10] In several instances, when serious questions concerning the validity of the authorizing resolution or statute have been raised in view of the constitutional guarantees of the first amendment, courts have construed the resolution or statute narrowly in order to avoid a constitutional determination, with the result that the particular query was held to be outside the scope of the authorized congressional inquiry as defined by the court.[11] The argument that the wording of the resolution or statute was too vague for a witness to determine with any certainty whether any particular question was pertinent has been repeatedly rejected.[12] However, the instant court, recognizing that the right of the witness to be free from unnecessary harassment must be balanced with the congressional need for information, accepted this position. It held that the authorizing resolution of the House Committee on Un-American Activities which granted jurisdiction over "un-American propaganda . . . and all other questions in relation thereto" [13] was too broad to be the basis for establishing the "question under inquiry" in a particular hearing and that due process required a more precise statement by the committee describing the nature of the current investigation and the manner in which the propounded questions were pertinent to that inquiry so that the witness might determine with reasonable certainty whether refusal to answer would subject him to a criminal penalty.[14]

The instant court's construction of "the question under inquiry" will help to eliminate harassment and possible jeopardy to witnesses from questions which might well be within the broad jurisdiction conferred on the committee and yet irrelevant to the area of current congressional interest. Furthermore, the requirement of a precise statement of the scope of committee inquiry and the manner in which a particular question is pertinent thereto will enable counsel for the witness to perform his function of advising the witness of his right not to disclose irrelevant information. It will also give courts trying contempt indictments a more concrete stand-

9. United States v. Knowles, 148 F. Supp. 832, 837 (D.D.C. 1957); United States v. Singer, 139 F. Supp. 847, 851 (D.D.C. 1956).

10. See United States v. Rumely, 345 U.S. 41 (1953); Bowers v. United States, 202 F.2d 447 (D.C. Cir. 1953); United States v. Shelton, 148 F. Supp. 926, 934 (D.D.C. 1957).

11. United States v. Rumely, 345 U.S. 41, 46 (1953) ("lobbying activities" construed to include only representations made directly to Congress, not attempts to sway public opinion); *cf.* United States v. Kamin, 136 F. Supp. 791 (D. Mass. 1956) ("government activities" construed to exclude defense plants).

12. Barsky v. United States, 167 F.2d 241 (D.C. Cir. 1947), *cert. denied*, 334 U.S. 843 (1948); United States v. Josephson, 165 F.2d 82 (2d Cir. 1947), *cert. denied*, 333 U.S. 838 (1948); United States v. Knowles, 148 F. Supp. 832 (D.D.C. 1957).

13. H. RES. 5, 83d Cong., 1st Sess., 99 CONG. REC. 15, 18 (1953).

14. Instant case at 214-15. See Musser v. Utah, 333 U.S. 95 (1948). Should Congress try to circumvent the procedural requirements imposed by the instant case by amending the relevant statute to require only pertinency to the area of jurisdiction conferred by Congress a due process attack based on the vagueness of the authorizing resolutions might prevail.

ard by which to judge guilt or innocence.[15] The burden imposed on investigating committees by the instant decision appears to be slight since the Court indicated that a relatively broad statement would be acceptable.[16] For example, had the subcommittee in the instant case made it clear to the witness that the inquiry concerned communist infiltration in labor and that the questions were designed to determine the extent of this infiltration, instead of giving the evasive answer that the subcommittee was investigating "subversion and subversive propaganda," [17] the Court would have been satisfied that the requirements of due process in this regard had been met.[18]

The holding of the instant case may have broader implications than merely protection of witnesses from questions irrelevant to the current subject of congressional inquiry. Where prejudice to the individual outweighs a remote congressional need for information sought from the witness, due process would seem to protect the witness from being compelled to answer even though the question was relevant to the current inquiry and not self-incriminating.[19] Although courts have consistently decried legislative investigation solely for the purpose of exposure,[20] broad authorization of committee jurisdiction [21] has made it virtually impossible for the courts to find that no valid legislative need was being served by detailed questions

15. The situation presented in the instant case is not limited in application to the House Committee on Un-American Activities since the committee jurisdictions conferred by the Legislative Reorganization Act of 1946, Act of Aug. 2, 1946, c. 753, 60 STAT. 812, (codified in scattered sections of 2, 5, 31, 33, 40, 44 U.S.C.) are necessarily broad to permit the routing of bills for consideration. *E.g.*, The Committee on Labor and Public Welfare is given jurisdiction over "public welfare generally," the Committee on the Armed Services over "common defense generally," and the Committee on the Judiciary over "civil liberties." To require that the authorizing resolution set out with particularity the intended scope of each investigative undertaking would necessitate the use of *ad hoc* committees which have been criticized on the grounds that the person who proposes the resolution invariably is appointed chairman, regardless of his qualifications.

16. Instant case at 212-14.

17. Instant case at 214.

18. In light of the view of the subject under inquiry taken by the Government it would seem that even questions concerning persons completely unconnected with the labor movement were not pertinent even if all procedural requirements had been met by the Committee. A recent case has held on the authority of the instant case that the vague authority, *i.e.*, to investigate "subversive activities," of the Senate Internal Security Subcommittee and the failure of the chairman to make clear to the witness the question under inquiry violated due process. United States v. Peck, 26 U.S.L. WEEK 1009 (D.D.C. July 16, 1957).

19. In articulating its awareness that prejudice to the individual is a primary factor in determining the proper scope of congressional inquiry the instant Court stated that "there was no congressional power to expose for the sake of exposure." Instant case at 200. The Court went on to state that "remoteness of subject can be aggravated by a probe for a depth of detail even farther removed from any basis of legislative action." Instant case at 204. In Sweezy v. New Hampshire, 354 U.S. 234 (1957), decided the same day as the instant case, the Court reversed a contempt conviction for refusal to answer questions before a state legislative investigating committee on the grounds that due process required a clear showing that the legislature wanted the information sought in light of prejudice to the witness from public exposure of his private affairs. *Id.* at 254.

20. Quinn v. United States, 349 U.S. 155, 161 (1955).

21. See note 15 *supra*.

into the private affairs of the witness.[22] The procedural requirement of a more precise statement of the subject under inquiry imposed by the instant case would seem to give the courts a more definite yardstick by which to measure the remoteness of the congressional need for the information requested in light of the hurt to the witness from public exposure of his private affairs.

Constitutional Law—

STATE CONSTITUTIONAL PROTECTION AGAINST SELF-INCRIMINATION EXTENDS TO MATTER INCRIMINATING UNDER FEDERAL LAW

A witness before a state grand jury refused to answer certain questions concerning communist activities on the ground that the answers might tend to incriminate him. The questions [1] were certified to the trial judge who ruled that the witness was privileged not to answer. The court of appeals affirmed, holding that although the answers could not incriminate the witness under state law,[2] the privilege against self-incrimination granted by the state constitution [3] extended to matter tending to incriminate under federal law.[4] *Commonwealth v. Rhine,* 303 S.W.2d 301 (Ky. 1957).

The privilege against self-incrimination had its origin in English common law [5] and is embodied in the fifth amendment of the federal constitution. Although the fourteenth amendment does not require the states to grant the privilege,[6] it is included in the constitutions of all but two of the states.[7] The privilege is applicable to grand jury proceedings [8] and legislative investigations [9] as well as to criminal trials, and both wit-

22. Chase, *Improving Congressional Investigations: A No-Progress Report,* 30 TEMP. L.Q. 126, 140 (1957).

1. "Do you know whether or not Carl Braden is a Communist? Did you ever attend any meeting in Carl Braden's house relative to Communism . . . ?" Instant case at 302.

2. The court had previously held that the state sedition statute was inoperative since under the doctrine of Commonwealth v. Nelson, 350 U.S. 497 (1956), Congress had preempted the field. Braden v. Commonwealth, 291 S.W.2d 843 (Ky. 1956).

3. KY. CONST. § 11, provides that "In all criminal prosecutions the accused . . . cannot be compelled to give evidence against himself. . . ." The privilege thus granted is applicable to a witness before a grand jury. Frain v. Applegate, 239 Ky. 605, 40 S.W.2d 274 (1931).

4. Sedition is made criminal by the Smith Act, 18 U.S.C. § 2385 (1952).

5. 8 WIGMORE, EVIDENCE § 2250 (3d ed. 1940).

6. Twining v. New Jersey, 211 U.S. 78 (1908).

7. 8 WIGMORE, *op. cit. supra* note 5, § 2252. In the two remaining states it is regarded as part of the common law. State v. Height, 117 Iowa 650, 91 N.W. 935 (1902). State v. Zdanowicz, 69 N.J.L. 620, 55 Atl. 743 (Ct. Err. & App. 1903).

8. Counselman v. Hitchcock, 142 U.S. 547 (1892); Frain v. Applegate, 239 Ky. 605, 40 S.W.2d 274 (1931).

9. United States v. Fitzpatrick, 96 F. Supp. 491 (D.D.C. 1951); United States v. Raley, 96 F. Supp. 495 (D.D.C. 1951); see also Note, 49 COLUM. L. REV. 87 (1949).

nesses [10] and those accused of crimes [11] can avail themselves of it. However, the privilege can be overcome and a witness compelled to testify when the danger of prosecution is removed by a statutory grant of immunity from prosecution,[12] provided such immunity is as broad as the protection afforded by the privilege itself.[13] Whether the privilege extends to matter incriminating only under the law of another jurisdiction has been the subject of conflicting judicial opinion.[14] The federal law on the question was apparently settled by the Supreme Court in *United States v. Murdock*,[15] which tacitly overruled prior federal decisions [16] recognizing the existence of a privilege where there was reasonable probability of ensuing state prosecution. The Court held that the protection of the fifth amendment did not apply to matter incriminating only under the law of another jurisdiction, basing its decision on the English precedents [17] and the reasoning that the state and federal governments are separate sovereigns,

10. Counselman v. Hitchcock, 142 U.S. 547 (1892). In applying the privilege to grand jury proceedings Kentucky has apparently disregarded the plain wording of the state constitution by extending the privilege to a mere witness. See Frain v. Applegate, 239 Ky. 605, 40 S.W.2d 274 (1931).

11. While a mere witness can be compelled to divulge non-incriminating information, an accused cannot be compelled to testify to any matter. 8 WIGMORE, *op. cit. supra* note 5, § 2268.

12. Brown v. Walker, 161 U.S. 591, 605 (1896). For the same reason the privilege does not apply when the danger has been removed by acquittal, Holt v. State, 39 Tex. Crim. 282, 45 S.W. 1016 (1898), or expiration of the time for prosecution, Weldon v. Burch, 12 Ill. 374 (1851).

13. Under federal law a statute which merely provides that compelled testimony shall not be used against the witness in a criminal prosecution is unconstitutional because it permits such testimony to be used to discover other evidence which is admissible. Counselman v. Hitchcock, 142 U.S. 547 (1892). The state courts are divided on the question of the constitutionality of such statutes. See *In re* Kelly, 200 Pa. 430, 50 Atl. 248 (1901) (constitutional); People *ex rel.* Lewisohn v. O'Brien, 176 N.Y. 253, 68 N.E. 353 (1903) (unconstitutional).

14. Privilege granted: Ballmann v. Fagin, 200 U.S. 186 (1906) (petitions charging witness with criminal activities previously filed in state court); United States v. Saline Bank, 26 U.S. (1 Pet.) 100 (1828) (testimony in federal court subjected witness to danger of state prosecution); *In re* Nachman, 114 Fed. 995 (D.S.C. 1902) (witness privileged not to testify to state activities even though federal statute granted immunity from federal prosecution); People *ex rel.* Morse v. Nussbaum, 55 App. Div. 245, 67 N.Y. Supp. 492 (3d Dep't 1900) (immunity granted by state statute insufficient when same conduct criminal under federal law). Privilege denied: Jack v. Kansas, 199 U.S. 372 (1905) (state immunity statute did not protect witness from state prosecution); Brown v. Walker, 161 U.S. 591 (1896) (federal statute construed to grant immunity from both federal and state prosecution); State v. March, 46 N.C. 526 (1854) (witness required to testify as to offense committed in another state).

15. 284 U.S. 141 (1931).

16. *Compare* Ballman v. Fagin, 200 U.S. 186 (1906) (petitions charging witness with criminal activities previously filed in state court); United States v. Saline Bank, 26 U.S. (1 Pet.) 100 (1828) (inquiry sought to establish identity of notes allegedly issued by unincorporated bank in violation of state law), *with* Jack v. Kansas, 199 U.S. 372 (1905) (the Court refused to view the danger of federal prosecution as real); Brown v. Walker, 161 U.S. 591 (1896) (federal statute granted immunity from state prosecution).

17. King of the Two Sicilies v. Willcox, 7 State Trials (N.S.) 1050, 61 Eng. Rep. 116 (1851); Queen v. Boyes, 1 B.&S. 311, 21 Eng. Rep. 730 (1861). The Court ignored the later English case of United States v. McCrae, L.R. 3 Ch. 79 (1867) in which the privilege was granted upon a showing that the danger of prosecution in the United States was substantial.

neither of which may interfere with the law enforcement process of the other.[18] Subsequent federal cases, however, suggest that the *Murdock* rule may no longer have vitality.[19] State courts which have ruled on the question in construing their constitutions, are predominantly in accord with the *Murdock* rule, rather than with the instant case.[20]

The privilege against self-incrimination has been characterized as a societal judgment that the dignity of the individual prohibits compelling a person to testify in a manner that might tend to be incriminatory to him.[21] It is readily conceded that matters of inquiry in one jurisdiction may be of interest to law enforcement officials in another.[22] Further, there is reasonable probability that information divulged in one jurisdiction will be dis-

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18. United States v. Murdock, 284 U.S. 141 (1931). The Court apparently accepted the argument that were the privilege to be extended to matter incriminating only under state law, a state would thereafter be able to place information beyond the reach of federal authorities by making the conduct to which the information related criminal. In this sense, the state would be interfering with the federal fact-finding process. The interference, however, stems initially not from state action but from the decision by the federal government not to avail itself of information at the cost of subjecting the witness to the danger of state prosecution. Moreover, even under an extended privilege, the information remains available to federal authorities provided it is covered by a statute granting immunity from state prosecution. See text and note at note 12 *supra,* and note 29 *infra.*

19. In United States v. DiCarlo, 102 F. Supp. 597 (N.D. Ohio 1952), the court refused to apply the *Murdock* rule to a legislative investigation into state crime. See also Marcello v. United States, 196 F.2d 437 (5th Cir. 1952). The Federal Immunity Act of 1954, 18 U.S.C. § 3486 (Supp. IV, 1957), by granting immunity from state as well as from federal prosecution, may have rendered the question moot in inquiries relating to matters of national security. Court approval of the grant must be obtained in each case, however, and the willingness of the courts to grant such approval when the subject of inquiry relates to matter criminal only under state law may be questionable.

20. *Accord,* People *ex rel.* Butler Street Foundry & Iron Co., 201 Ill. 236, 66 N.E. 349 (1903); Ferris v. Lockett, 175 Kan. 704, 267 P.2d 190 (1954); Greece v. Koukouras, 264 Mass. 318, 162 N.E. 345 (1928); State v. Ruff, 176 Minn. 308, 223 N.W. 144 (1929); *In re* Pillo, 11 N.J. 8, 93 A.2d 176 (1952); State v. Morgan, 164 Ohio St. 529, 133 N.E.2d 104 (1956); State v. Wood, 99 Vt. 490, 134 Atl. 697 (1926); *In re* Greenleaf, 176 Misc. 566, 28 N.Y.S.2d 28 (Sup. Ct. 1941); *Ex parte* Copeland, 91 Tex. Crim. 549, 240 S.W. 314 (1922); *contra,* People v. Den Uyl, 318 Mich. 645, 29 N.W.2d 284 (1947); State *ex rel.* Mitchell v. Kelly, 71 So. 2d 887 (Fla. 1954) (dictum); State *ex rel.* Doran v. Doran, 215 La. 151, 39 So. 2d 894 (1949) (privilege granted to witness under indictment in another state).

21. GRISWOLD, THE FIFTH AMENDMENT TODAY (1955). The wide use of immunity statutes, which protect the witness from prosecution but not from disgrace, would appear to cast doubt on the correctness of the Griswold formulation. Wigmore considers the privilege as a safeguard against institution of the civil law inquisitorial method of prosecution, rejected by the common law in favor of the accusatorial method. 8 WIGMORE, *op. cit. supra* note 5, § 2251. Although the Wigmore position is posited on a loss of information to the state, when the issue is extension of the privilege to matter incriminating only in another jurisdiction, both positions require a balancing of gain to the individual against detriment to the state. Some authorities contend that the privilege should be completely abolished. See MCCORMICK, EVIDENCE 288-90 (1954); Note, 61 YALE L.J. 105, 110 n.25 (1952).

22. A state antitrust proceeding may reveal violation of the federal antitrust laws. See Jack v. Kansas, 199 U.S. 372 (1905). A state bribery investigation may reveal violations of federal tax law. See Doyle v. Hofstader, 257 N.Y. 244, 177 N.E. 489 (1931). Cross-examination to discredit a witness in a state proceeding may necessitate an admission of criminal conduct in another state. See Williams v. Commonwealth, 128 Va. 698, 104 S.E. 853 (1920). A state civil proceeding may reveal a use of the mails to defraud. See Feldman v. United States, 322 U.S. 487 (1944).

closed to the authorities of another. The publicity attendant upon legislative hearings,[23] cooperation between law enforcement officials of various jurisdictions not amounting to a collusive attempt to circumvent the privilege,[24] and the apparent power of state officials to turn over the results of grand jury proceedings to the authorities of the federal and other state governments [25] all tend to effect such disclosure. In addition, information rendered by a witness, even though compelled under an immunity statute of one jurisdiction, can be used by another in bringing action against the witness.[26] In view of this situation, the extension of the privilege against self-incrimination to matter which might tend to incriminate the witness in another jurisdiction would appear to be reasonable provided it does not materially impair the ability of the state to obtain needed information.[27]

The state is legitimately interested in obtaining all information relevant to its subject of inquiry,[28] whether that information is to the witness non-incriminating, incriminating within the jurisdiction, or incriminating only in another jurisdiction. The witness will have little interest in refusing

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23. The Kefauver Committee estimated that its New York hearings were viewed on television by upwards of 30,000,000 people. S. REP. No. 307, 82d Cong., 1st Sess. 24 (1951). See also United States v. DiCarlo, 102 F. Supp. 597, 600 (N.D. Ohio 1952).

24. Were it to amount to collusion, use of the information by the other jurisdiction might constitute a denial of due process. See Feldman v. United States, 322 U.S. 487 (1944).

25. In at least thirteen states, including Kentucky, a transcript of grand jury proceedings is required by statute. Morse, *Survey of the Grand Jury System*, 10 ORE. L. REV. 295, 331 (1931). In one of these, Arizona, disclosure may be made by the prosecuting attorney only for the purposes of impeaching the witness. ARIZ. CODE ANN. § 44-630 (1939). In another, New York, a court order is required before disclosure can be made. N.Y. CODE CRIM. PROC. § 952-t. Such an order has been granted to permit use of the transcript by the federal government. See *In re* Attorney Gen., 160 Misc. 533, 291 N.Y. Supp. 5 (Sup. Ct. 1936). In the remaining states, the transcript is given to the prosecuting attorney with no qualifications. See, *e.g.*, MASS. ANN. LAWS c. 277, § 10 (1956); MICH. STAT. ANN. § 28.956 (1954); *cf.* FED. R. CRIM. P. 6(e); Doe v. Rosenberry, 152 F. Supp. 403 (S.D.N.Y. 1957) (disclosure of testimony before federal grand jury made to grievance committee of state bar association inquiring into conduct of witness).

26. Such information may be of use both as evidence upon which a conviction may be based, or as a means of discovering such evidence. Since the testimony itself, even though compelled under a state immunity statute, is admissable against the witness in a federal criminal prosecution, Feldman v. United States, 322 U.S. 487 (1944), a fortiori it may be used to discover other evidence. In the only state case involving the question, testimony compelled in a federal proceeding was held inadmissable. Clark v. State, 68 Fla. 433, 67 So. 135 (1914). The Florida rule, however, does not necessarily prevent the use of the testimony to discover other evidence.

27. Recognition of the privilege under any circumstances tends to deprive fact-finding bodies of information which would aid in the ascertainment of truth. MCCORMICK, *op. cit. supra* note 21, at 288. That this information is needed is emphasized by the fact that legislatures have long been willing to grant immunity from prosecution in exchange for the information. For a history and compilation of state and federal immunity statutes, see 8 WIGMORE, *op. cit. supra* note 5, § 2281.

28. The Supreme Court has apparently attempted to enforce federal due process requirements on the scope of committee investigations by both federal and state governments. See Watkins v. United States, 354 U.S. 178 (federal), 106 U. PA. L. REV. 124 (1957); Sweezy v. New Hampshire, 354 U.S. 234 (1957) (state).

to divulge non-incriminating information. However, his estimate of the probability that he will be forced to divulge incriminating matter which will be used against him in a subsequent prosecution will govern the extent of his efforts to avoid appearing at all and, if he does appear, the possibility of his risking contempt by refusing to answer. If the state refuses to extend the privilege to matter which might tend to incriminate in another jurisdiction, it will run the risk of successful evasion of process which will deny to it the benefit of any non-incriminating information which the witness may possess, in addition to any matter which, although it might tend to show a violation of the law of the state, could be compelled under an immunity statute.[29] If the privilege is extended, the possibility that the witness will attempt to avoid process will be diminished. Once the witness appears, non-incriminating material and matter which might tend to incriminate him within that jurisdiction will be divulged. Refusal to extend the privilege will result additionally in the obtaining of information incriminating in another jurisdiction whenever the danger of prosecution in the other jurisdiction is not sufficiently great to induce the witness to stand in contempt rather than divulge the information. If the privilege is extended, on the other hand, the chances of obtaining such information are lessened, since the witness will invoke the privilege freely. Thus, evaluating the desirability of extending the privilege in terms of the state's fact-finding process entails a determination of whether the loss of information which might tend to incriminate a witness in another jurisdiction is as great an injury to the state as is the loss of all information from a witness through the successful evasion of process. Although it appears probable that free exercise of an extended privilege may cause greater loss of information than evasion of process in the absence of the extended privilege, such a determination must necessarily be imprecise, and the likelihood of the state being in a markedly worse position under one alternative as opposed to the other is small. On the other hand, extending the privilege at least has the positive advantage of aiding the individual. Measuring this against the slight difference in effect upon the state in either extending or not extending the privilege, the result reached in the instant case appears correct.[30]

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29. A state, of course, has no power to grant immunity from prosecution by another state or by the federal government. On the other hand, the federal government may grant immunity from prosecution by a state, at least in areas such as sedition, in which its interest is paramount. Ullmann v. United States, 350 U.S. 422 (1956).

30. At a minimum it would appear desirable to extend the privilege when the likelihood of prosecution in the foreign jurisdiction is great. For example, where prosecution in another jurisdiction is already in progress, the individual's need for protection is clear. See Ballmann v. Fagin, 200 U.S. 186 (1906); State *ex rel.* Doran v. Doran, 215 La. 151, 39 So. 2d 894 (1949); People v. Den Uyl, 318 Mich. 645, 29 N.W.2d 284 (1947). Similarly, where the questions propounded are specifically directed toward criminal activity in the foreign jurisdiction, prosecution becomes more likely and protection is needed. See Marcello v. United States, 196 F.2d 437 (5th Cir. 1952); United States v. DiCarlo, 102 F. Supp. 597 (N.D. Ohio 1952). The absence of the above indications, of course, does not compel a conclusion that no danger exists. See text and notes at notes 22 to 26 *supra*.

Constitutional Law—

REFUSAL OF POLICE COMMISSIONER TO PERMIT SHOWING OF FILM ON GROUND OF OBSCENITY UPHELD

A Chicago ordinance makes it unlawful to exhibit motion picture films without first securing a permit from the commissioner of police, who is required to deny the permit if the picture is "immoral or obscene." [1] Provision is made for final appeal to the mayor.[2] Defendant commissioner of police refused to grant plaintiff a permit to exhibit a particular film on the ground that the film was not acceptable to standards of decency [3] and defendant mayor sustained the denial on the ground that the film was immoral and obscene.[4] On complaint to the United States district court, the ordinance was held not to be void for vagueness under the fourteenth amendment nor an unconstitutional restraint on freedom of speech under the first amendment.[5] The circuit court affirmed.[6] *Times Film Corp. v. Chicago,* 244 F.2d 432 (7th Cir. 1957), *petition for cert. filed,* 26 U.S.L. WEEK 3067 (U.S. Aug. 27, 1957) (No. 372).

The first amendment's protection of freedom of speech and press, made applicable to the states by the fourteenth amendment,[7] is inclusive of motion pictures,[8] but the constitutional protection afforded any of the media of communication is not absolute.[9] In *Roth v. United States* [10] the Supreme Court held that obscene matter is "not within the area of constitutionally protected speech or press." [11] However, attempts to prevent distribution of obscene material have met two constitutional objections. The first, formulation of a standard for judging obscenity sufficiently definite to withstand the attack of vagueness,[12] has been obviated by the test for

1. Chicago Municipal Code, c. 155, § 1-7.
2. *Id.* § 4.
3. Times Film Corp. v. Chicago, 139 F. Supp. 837, 839 (N.D. Ill. 1956).
4. *Ibid.*
5. 139 F. Supp. 837, 841 (N.D. Ill. 1956).
6. Although the district court applied only the first amendment to plaintiff's freedom of speech argument, the circuit court properly applied the first amendment through the fourteenth, as the first pertains only to federal action. See Palko v. Connecticut, 302 U.S. 319 (1937).
7. Near v. Minnesota, 283 U.S. 697, 707 (1931); Gitlow v. New York, 268 U.S. 652, 666 (1925).
8. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952); United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948) (dictum). *Cf.* Mutual Film Corp. v. Industrial Comm'n, 236 U.S. 230 (1915).
9. Schenck v. United States, 249 U.S. 47, 52 (1919); Whitney v. California, 274 U.S. 357, 369-70, 373 (1927); Near v. Minnesota, 283 U.S. 697, 708 (1931).
10. 354 U.S. 476 (1957).
11. *Id.* at 485. See also Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (dictum); Near v. Minnesota, 283 U.S. 697, 716 (1931) (dictum).
12. See Holmby Productions, Inc. v. Vaughn, 350 U.S. 870 (1955) (holding unconstitutional a statute requiring a censorship board to disapprove films found to be "obscene, indecent, or immoral, or such as tend to debase or corrupt morals"); Commercial Pictures Corp. v. Regents of University of State of New York, 346 U.S. 587 (1954) (holding unconstitutional a statute requiring suppression of films that are "immoral" or "would tend to corrupt morals"); Superior Films, Inc. v. Department of Educ., 346 U.S. 587 (1954) (holding unconstitutional a statute interpreted as authorizing restraint of a film "on account of being harmful"); Gelling v. Texas, 343 U.S. 960 (1952) (holding unconstitutional a statute restricting films "of such character as to be prejudicial to the best interests of the people"); Winters v. New

obscenity promulgated by the Court in *Roth*.[13] The second pitfall to restraint of obscene matter has been the reluctance of the Supreme Court to uphold restraints on communication prior to dissemination.[14] In *Near v. Minnesota*[15] the Supreme Court held invalid under the fourteenth amendment a state statute empowering the courts of that state to enjoin dissemination of future issues of a publication after determining that past issues of the publication were scandalous and defamatory. The Court characterized the restraint as "of the essence of censorship,"[16] and in dictum indicated that subsequent punishment is the appropriate remedy for dealing with abuse of constitutional privilege.[17] Recently, however, in *Alberts v. California*[18] the Court upheld against constitutional attack a state statute making it a misdemeanor to "lewdly keep for sale obscene and indecent books."[19] And in *Kingsley Books, Inc. v. Brown*,[20] decided

York, 333 U.S. 507 (1948) (holding unconstitutional a statute that was interpreted as prohibiting distribution of magazines found "indecent and obscene" because the magazines "massed" stories of bloodshed and lust to incite crimes).

13. "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest." 354 U.S. at 489. Chief Justice Warren, concurring, would have preferred a test focusing on the use to which the material was put as opposed to a test concerned with the material itself. *Id.* at 495-96. Justice Harlan, dissenting in *Roth* and concurring in *Alberts*, expresses doubt that the statutory definitions at issue in the two cases are reconcilable with that adopted by the Court. *Id.* at 498-500. Justice Douglas, dissenting, with whom Justice Black concurred, objected that the standards prescribed by the Court inflicted punishment "for thoughts provoked, not for overt acts nor antisocial conduct." *Id.* at 509.

The ordinance in the instant case has been interpreted by the highest court of the state of Illinois. See American Civil Liberties Union v. Chicago, 3 Ill.2d 334, 121 N.E.2d 585 (1954). The interpretation placed upon the ordinance accords with the standard adopted by the Supreme Court in *Roth*. 354 U.S. at 489, n.26. No attack on the ordinance on grounds of vagueness would therefore appear possible.

14. Patterson v. Colorado, 205 U.S. 454, 462 (1907) ("[T]he main purpose of such constitutional provisions is 'to prevent all . . . *previous restraints* upon publications as had been practiced by other governments.'"); Near v. Minnesota, 283 U.S. 697, 713-14 (1931) ("In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication."); Kunz v. New York, 340 U.S. 290 (1951); Largent v. Texas, 318 U.S. 418 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940); Lovell v. City of Griffin, 303 U.S. 444 (1938). See also Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 539 (1951), calling for a pragmatic assessment of the doctrine of prior restraint in particular circumstances, and the Supreme Court's acceptance of Professor Freund's conclusion in Kingsley Books, Inc. v. Brown, 354 U.S. 436, 442 (1957).

15. 283 U.S. 697 (1931).

16. *Id.* at 713.

17. *Id.* at 720.

18. 354 U.S. 476 (1957). The *Roth* and *Alberts* cases were decided by a single opinion. In the former, the constitutionality of 18 U.S.C. § 1461 (1952), making punishable the mailing of material that is "obscene, lewd, lascivious, or filthy . . . or other publication of an indecent character," and Roth's conviction thereunder were sustained. In the *Alberts* case the constitutionality of CAL. PEN. CODE ANN. § 311 (West 1955), making it a misdemeanor to keep for sale or for advertising material what is "obscene or indecent," and Alberts' conviction thereunder, were sustained. Justice Harlan concurred in *Alberts* but dissented in the *Roth* case ". . . for the interests which obscenity statutes purportedly protect are primarily entrusted to the care, not of the Federal Government, but of the States" and "... the dangers of federal censorship in this field are far greater than anything the States may do." 354 U.S. at 504-05. Justice Douglas, with Justice Black, dissented, denying that obscenity is beyond the pale of the first amendment.

19. CAL. PEN. CODE ANN. § 311 (West 1955).

20. 354 U.S. 436 (1957).

the same day as *Alberts,* the Court sustained a state statute permitting the enjoining pendente lite of the distribution of allegedly obscene matter.[21] The statute provided for trial within one day of "joinder of issue" and for a decision by the court within two days of conclusion of the trial.[22] Distinguishing *Near v. Minnesota* on its facts,[23] the Court rejected the test of prior restraint as conclusive of the result[24] and, instead, based its holding on a determination that the restraint was no greater in effect than that upheld in *Alberts.*[25] The instant case, decided just prior to *Alberts* and *Kingsley,* appears to involve a restraint markedly different in impact than the restraint sustained in either of those cases.[26]

In *Alberts* and *Kingsley,* though enforcement of the statutes there upheld lay in the hands of the executive, determination of the issue of obscenity was made by the judiciary. Under the instant ordinance the local police chief is empowered to determine whether a film is obscene and to enforce that determination by refusing to issue a license to exhibit the film. This merger of functions in one person may well operate to the detriment of the distributor and the public, there being no safeguard against over-zealous enforcement as in the other two cases. The effect of the risk of bias engendered by the police chief's dual role is further magnified by the difficulties inherent in the subject matter itself. Under any proposed test, the distinction between obscene and non-obscene matter is

21. N.Y. CODE CRIM. PROC. § 22-a.
22. *Ibid.*
23. 354 U.S. at 445.
24. *Id.* at 441-42.
25. *Id.* at 442-44. Chief Justice Warren dissented in *Kingsley* on the grounds that the statute lacked a standard for judging the book in its setting. "It is the manner of use that should determine obscenity." 354 U.S. at 445-46. Justice Douglas, joined by Justice Black and Justice Brennan, dissented on the ground that the injunction pendente lite, issued without hearing and without any ruling or finding on the issue of obscenity, violated the first amendment. He found further violation of that amendment in that the statute effected a state-wide decree, not allowing for different use of the subject matter in various parts of the state, nor community differences in opinion on what is obscene. 354 U.S. at 446-47. Justice Brennan objected in his own dissent, to the absence of a provision in the statute for jury determination of the issue of obscenity. 354 U.S. at 447-48.
26. There has been no apparent judicial distinction between movies and books. "It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform. As was said in Winters v. New York . . . 'The line between the informing and the entertaining is too elusive for the protection of that basic right (a free press). Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine.' It is urged that motion pictures do not fall within the First Amendment's aegis because their production, distribution, and exhibition is a large-scale business conducted for private profit. We cannot agree. That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment. We fail to see why operation for profit should have any different effect in the case of motion pictures. It is further urged that motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression. Even if one were to accept this hypothesis, it does not follow that motion pictures should be disqualified from First Amendment protection. If there be capacity for evil it may be relevant in determining the permissible scope of community control, but it does not authorize substantially unbridled censorship such as we have here." Joseph Burstyn, Inc. v. Wilson, 343 U.S. at 501-02.

tenuous at best.[27] It would seem that the danger in reposing the combination of functions in a single individual dealing with an illusory distinction should require, at the minimum, an independent determination of the issue of "obscenity," such as provided in both *Kingsley* and *Alberts*.

Even if the police chief were capable of rendering an impartial decision, the ordinance in the instant case is subject to attack on broader grounds. The ordinance provides that all motion pictures are subject to scrutiny prior to dissemination whereas in *Kingsley* and *Alberts* only suspect matter was examined prior to dissemination.[28] As a practical matter, by requiring prior inspection of all films, the initiative is placed upon the individual motion picture exhibitor to come forward prepared to convince the authority responsible for issuing permits that the film is not obscene.[29] If any value exists in permitting expression of ideas to the public, it would seem that exertion of the police power to restrain such dissemination should be accompanied, at least, by the burden of proving that the particular vehicle of expression is violative of a valid public interest. Furthermore, the absence of a provision for rapid determination of the issue of obscenity may be so competitively prejudicial to the distributor as to prevent showing of a particular film, regardless of the ultimate decision. The opportunities for abuse in such a system are manifest and dictate that control over a medium of communication should be exercised only with attendant procedural safeguards. Although each of the objections noted appears in itself to be sufficient to overturn the ordinance, the combination of them should make reversal of the instant decision obligatory.

Labor Law—

DUTY OF DISCRIMINATORILY DISCHARGED EMPLOYEE TO MITIGATE DAMAGES IN ACTION FOR BACK PAY EXTENDED TO REQUIRE SEARCH FOR LESS THAN SUBSTANTIALLY EQUIVALENT EMPLOYMENT AFTER PASSAGE OF REASONABLE PERIOD OF TIME

Defendant employer discharged several unskilled knitting mill workers, two of whom remained unemployed for approximately two years. The

27. In *Roth*, the Court rejected previously applied tests of whether or not a clear and present danger of anti-social conduct will be created by the material, and the judging of material merely by the effect of an isolated excerpt upon particularly susceptible persons. 354 U.S. at 486, 488-89. The Court noted the relevance of how the questioned material is used by referring to the A.L.I. Model Penal Code, comments, which explain that an appeal to the prurient interest "is especially likely if the material is presented in a sly, leering manner, or in vulgar terms manifestly chosen merely to shock or titillate the reader" and that it is deterrence of "deliberate stimulation and exploitation of emotional tensions arising from the conflict between social convention and the individual's sex drive" which is aimed at by the proposed legislation. *Id.* at 487.

28. The statute considered in *Alberts* was also a prior restraint in that it makes mere writing, printing, or keeping for sale, or similar acts precedent to dissemination of obscene material a misdemeanor. CAL. PEN. CODE ANN. § 311 (West 1955).

29. There is no provision for either a hearing or judicial review in the ordinance. Chicago Municipal Code, c. 155, § 1-7.

NLRB determined that the discharges were discriminatory in violation of the Labor Management Relations Act,[1] and ordered the workers reinstated with back pay.[2] The two who had remained unemployed were unable to reach an agreement with the employer on the amount of back pay due them and sought NLRB determination of the amount. The Board held that although such employees have an obligation to minimize the damages resulting from a discriminatory discharge, this obligation had been satisfied in that the employees had made reasonable efforts to find substantially equivalent employment.[3] The circuit court denied enforcement, holding that an employee who has failed to find a substantially equivalent position after a reasonable search must make an effort to obtain other suitable employment, even though this might mean taking a lower paying position. *NLRB v. Southern Silk Mills, Inc.*, 242 F.2d 697 (6th Cir. 1957), *cert. denied*, 26 U.S.L. WEEK 3111 (U.S. Oct. 15, 1957) (No. 206).

The NLRB has discretionary power in cases in which an employer has discriminatorily discharged an employee to issue an order requiring "reinstatement . . . with or without back pay, as will effectuate the policies of the [Labor Management Relations] Act."[4] Imposition of such an order with payment of back wages is intended to reimburse the employee for damages which he suffered as a result of the discriminatory discharge.[5] Wages earned by the employee during the period of illegal discharge are deducted from the employer's obligations under the order,[6] but compensation is required for employee expenditures in obtaining interim employment.[7] Initially, the employee was under no obligation to mitigate damages by seeking other employment during the period of discharge.[8]

1. Labor Management Relations Act (Taft-Hartley Act), 61 STAT. 136 (1947), 29 U.S.C. §§ 141-88 (1952). The act is designed "to prescribe the legitimate rights of both employees and employers in their relations . . . ." 61 STAT. 136 (1947), 29 U.S.C. § 141 (1952).

2. Southern Silk Mills, Inc., 101 N.L.R.B. 1 (1952), *enforcement granted*, 209 F.2d 155 (6th Cir. 1953), *cert. denied*, 347 U.S. 976 (1954).

3. Southern Silk Mills, Inc., 116 N.L.R.B. 769 (1956).

4. Labor Management Relations Act (Taft-Hartley Act), 61 STAT. 147 (1947), 29 U.S.C. § 160 (c) (1952).

5. Social Security Bd. v. Nierotko, 327 U.S. 358 (1946). See Notes, 50 YALE L.J. 507, 510-11 (1941), 48 YALE L.J. 1265 (1939).

6. Western Felt Works, 10 N.L.R.B. 407 (1938). Strike and relief benefits are not considered earnings and therefore are not deducted from back pay due. Vegetable Oil Products Co., 5 N.L.R.B. 52 (1938); Sterling Corset Co., 9 N.L.R.B. 858 (1938). Payments for employment on work-relief programs also are not considered earnings, insofar as the employer is concerned, but the amount earned on such projects is deducted from the pay due and paid to that agency which supplied the funds for the project. Empire Furniture Corp., 10 N.L.R.B. 1026 (1939).

7. Crossett Lumber Co., 8 N.L.R.B. 440 (1938). Payment was to be "equal to that which each would normally have earned as wages . . . less the net earnings of each . . . remaining after deductions of expenses." *Id.* at 496. ". . . [T]hey incurred expenses such as for transportation, room and board, which they would not have incurred had they continued to work for the respondent. . . ." *Id.* at 498.

8. Western Felt Works, 10 N.L.R.B. 407 (1938). Contracts doctrine requires mitigation when an employee is discharged in breach of a contract of employment only to the extent of seeking equivalent employment. Hussey v. Holloway, 217 Mass. 100, 104 N.E. 271 (1914) and cases collected in 28 A.L.R. 736, 141 A.L.R. 662. Texas

However, the Supreme Court in *Phelps Dodge Corp. v. NLRB* [9] limited employee recovery to exclude damages "willfully incurred." [10] The Board has subsequently defined "willfully incurred" to include, *inter alia,* failure to exert reasonable effort to seek "substantially equivalent employment." [11] The instant case extends the category of damages which are "willfully incurred" to include a failure to search for "suitable" or "satisfactory" employment after the passage of a "reasonable" period of time spent in an unsuccessful search for "substantially equivalent" employment.[12]

By requiring that a discriminatorily discharged employee make a wider search and accept less desirable positions than has heretofore been necessary to qualify for maximum back pay recovery, the instant case would appear to place an additional burden on him. Practically, however, the additional burden on most such employees is slight. The uncertainty that the discharge will subsequently be determined to have been discriminatory when coupled with the employee's necessity to maintain a cash inflow should stimulate him to seek other sorts of employment when substantially equivalent work is not available. It is, thus, only with regard to those employees who are either not inclined to work or who are under no economic compulsion to work that the instant case has major impact, since such employees are not as likely to exert effort to find less desirable positions in the absence of equivalent employment.[13]

In determining whether these employees should be encouraged to seek other employment by a more stringent mitigation requirement the

is contra to this view and follows the holding in the instant case. Kramer v. Wolf Cigar Stores Co., 99 Tex. 597, 91 S.W. 775 (1906), and cases collected in 28 A.L.R. 744, 141 A.L.R. 668. It does not appear, however, that the periods of unemployment considered in the contracts cases were as lengthy as in the instant case. In *Hussey v. Holloway, supra,* it was within the province of the jury to decide whether it was justifiable for the discharged employee to refuse offers for work at a lower pay than that from which she was discharged. "His recovery will not be diminished because he fails to engage in a business that is not of the same general character as that for which he contracted. . . ." 5 WILLISTON, CONTRACTS § 1359 (2d ed. 1937).

9. 313 U.S. 177 (1941).

10. *Id.* at 198.

11. Ohio Pub. Serv. Co., 52 N.L.R.B. 725 (1943), *enforcement granted,* 144 F.2d 252 (6th Cir. 1944), *cert. denied,* 324 U.S. 857 (1945). ". . . [W]e shall . . . permit . . . evidence not only on whether a dischargee has unjustifiably refused to accept, or has given up, desirable new employment, but also on whether he has made a reasonable effort to obtain such employment." Registration with United States Employment Service was held to be conclusive proof of "reasonable efforts" to obtain new employment. This test evolved during the manpower shortages of World War II. *Id.* at 729. State employment services were later included in this test, Harvest Queen Mill & Elevator Co., 90 N.L.R.B. 320, 322 (1950), but later decisions overthrew this standard, holding that such registration was evidence of the reasonableness of the search, but was no longer conclusive. Southern Silk Mills, Inc., 116 N.L.R.B. 769 (1956), 105 U. PA. L. REV. 1012 (1957); NLRB v. Pugh & Barr Inc., 207 F.2d 409 (4th Cir. 1953), 52 MICH. L. REV. 923 (1954).

12. Instant case at 700. See NLRB v. Moss Planing Mill Co., 224 F.2d 702 (4th Cir. 1955) (agricultural employment held satisfactory for lumber mill workers who were under duty to seek employment on farms after a discriminatory discharge).

13. The trial examiner in the instant case found that employment opportunities existed during the two year period of discharge in a processing plant and retail stores, which were considered satisfactory employment for the fired employees. Southern Silk Mills, Inc., 116 N.L.R.B. 769, 778, 786 (1956). In addition there was evidence that both of the workers' husbands were employed during the time of the discharge. *Id.* at 781, 782.

purpose of the back pay award must be examined. If the primary purpose of awarding back pay following discriminatory discharge is to penalize the employer for his ill-advised conduct and thus to deter him in the future from similar conduct, such purpose would be served better by limiting the mitigation doctrine to a requirement of seeking "substantially equivalent" employment or by abandoning the mitigation doctrine entirely. On the other hand, if the primary purpose of the back pay award is to save the discriminatorily discharged employee from loss, a requirement that he seek less desirable employment after a fruitless search for equivalent employment would not be inconsistent with that purpose. Judicial interpretation suggests that the act is, in fact, more concerned with the compensatory aspects of back pay awards than with the deterrent effect that they may have,[14] apparently justifying the instant decision. However, any increase in the burden on a discriminatorily discharged employee should be with recognition that under conditions of relatively full employment the likelihood that such an employee will find other work is high and the employer's potential back pay liability is therefore small. Lessening the employer's financial risk may encourage management use of the discharge as a device to combat tensions between it and labor, a development contrary to the expressed policy of the LMRA against discriminatory discharges.[15] Nevertheless, it is believed that wise administration of the new standard can take into account this danger and avert it, while limiting the employer's liability in an extreme situation such as the one presented by the instant case.[16]

The NLRB can expect two types of problems in administering the new standard of mitigation. The first is the increased administrative workload occasioned by the need to consider a wider range of evidence. Employers may be expected to resist liability by demonstrating that a variety of other jobs existed in the community, and employees, in order to show that they are entitled to back pay, will present evidence of their efforts to find employment other than "substantially equivalent" employment. Although this problem may be a serious one, it presents difficulties only quantitatively rather than qualitatively different from those which the

14. The purpose of the back pay order cannot be accurately described as wholly compensatory since there is a certain punitive and preventive aspect of the remedy. The Labor Management Relations Act (Taft-Hartley Act), embodies the same phrase in granting to the NLRB the right to make a back pay order as was found in the National Labor Relations Act: ". . . to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this act." 61 STAT. 146 (1947), 29 U.S.C. § 160(c) (1952). However, other considerations notwithstanding, the Supreme Court has declared, in construing the previous act, "'Back pay' is not a fine or penalty imposed upon the employer by the Board." Social Security Bd. v. Nierotko, 327 U.S. 358, 364 (1946). "The sanctions of the Act are imposed not in punishment of the employer but for the protection of the employees." NLRB v. Virginia Elec. & Power Co., 314 U.S. 469, 477 (1941). The Board has consistently followed this position, employing the formula in its orders, "to make [the employee] whole for any loss of pay he may have suffered. . . ." Ohio Pub. Serv. Co., 52 N.L.R.B. 725, 742 (1943). The mere presence of other effects should not negate the proposition that the main purpose of such relief is a compensation to the injured employees.

15. 61 STAT. 140 (1947), 29 U.S.C. §§ 158 (a) (1), (3) (1952).

16. See note 13 *supra*.

NLRB must already face.[17] Moreover, resolution of this difficulty will depend, in large measure, upon the success of the NLRB in resolving the second of the problems—formulating definitions of a "reasonable" time spent looking for substantially equivalent work and of other "suitable" work to which the employee must turn. Although no exact definitions governing all cases are possible, a number of factors can be isolated which should be considered in specific cases.

What constitutes a "reasonable" length of time spent looking for substantially equivalent employment should depend upon the intensity of the search to find equivalent employment, the prospects which should be known to the employee, and the education, experience and ability of the employee which will not be fully utilized if he accepts less skilled employment.[18] The trial examiner in the instant case found that seven months would have been a reasonable time to spend searching for equivalent employment,[19] but had the employees eventually accepted other employment rather than remaining idle, there is reason to believe that a longer period might have been found reasonable under such circumstances.[20] What constitutes other "suitable employment" should depend on the employee's level of education, experience and ability, his former rate of pay and working conditions, and the availability of other employment. In applying the relevant factors to both of these definitions, the Board should be mindful that too stringent a mitigation requirement may serve to encourage employers' discriminatory discharges, a result dictating that doubtful cases be resolved favorably to the employee.

Trade Regulation—

INJUNCTION DENIED UNDER FAIR-TRADE LAWS AGAINST OUT-OF-STATE MAIL-ORDER HOUSE SOLICITING SALES THROUGH PARENT CORPORATION IN FAIR-TRADE JURISDICTION

Defendant District of Columbia mail-order house, a wholly owned subsidiary of a New York discount house, was formed after the parent was

17. The Board raised the problem of administrative difficulties in applying a mitigation standard in Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 198 (1941). The Court held that principles of social desirability were of more importance than these difficulties.

18. "There comes a time after opportunities for comparable jobs have been canvassed without success, when the job applicant must lower his sights or face a long period of idleness." Instant case at 699. The court considered the time spent searching, and the training, experience and background of the employees, as well as those classes of jobs that might have been considered "satisfactory employment," a position essentially the same as that taken by the trial examiner in the case. *Id.* at 699-700.

19. Southern Silk Mills, Inc., 116 N.L.R.B. 769, 787 (1956). See Supplemental Intermediate Report, *id.* at 778.

20. In requiring that employees seek other "satisfactory employment," the court seemed more concerned with the fact that the workers here had remained unemployed for approximately two years rather than with the fact that they spent seven months looking for "substantially equivalent" employment. Instant case at 700.

enjoined under the New York fair-trade law [1] from violating plaintiff manufacturer's resale price maintenance agreements. Customers seeking purchase of plaintiff's products at discount from the parent's New York retail store were provided with defendant's mail-order forms and instructed to forward them to defendant in Washington, D. C.,[2] from whence delivery was made. Moreover, the parent provided defendant material assistance in conducting an advertising campaign in New York. The instant action was brought under the New York fair-trade act [3] to enjoin defendant from "wilfully and knowingly advertising, offering for sale or selling" [4] plaintiff's products within New York at less then the minimum prices stipulated in plaintiff's applicable fair-trade agreements. The district court granted an injunction,[5] but on appeal the court of appeals reversed and dismissed the action (one judge dissenting), holding that by virtue of section 5(a)(3) of the McGuire Act [6] no fair-trade enforcement action lies unless the resales in question occur in a fair-trade state, and that here the sales were consummated in Washington, D. C.,[7] a free-trade jurisdiction. *General Elec. Co. v. Masters Mail Order Co.*, 244 F.2d 681 (2d Cir. 1957), *cert. denied*, 26 U.S.L. WEEK 3114 (U.S. Oct. 15, 1957) (No. 224).

In the absence of congressional authorization, resale price maintenance agreements applicable to goods moving in interstate commerce would be violative of the Sherman Antitrust Act.[8] Therefore, enforcement of such agreements under state fair-trade laws may not transcend the scope of the federal exemption afforded them.[9] Congress first granted resale price maintenance agreements partial immunity from the antitrust laws by the

1. N.Y. GEN. BUS. LAW § 369.

2. The District of Columbia and eight states presently have no operative fair-trade legislation. In these "free-trade" jurisdictions resale price maintenance agreements are unenforceable with respect to intrastate transactions as unlawful restraints of trade. See 1 CCH TRADE REG. REP. ¶ 3080, 3085 (10th ed. 1956). See also text at note 7 *infra*.

3. Federal jurisdiction was obtained on the basis of diversity of citizenship. 28 U.S.C. § 1332 (1952). Process was served in New York on defendant's treasurer who also served as an officer of the New York parent, Masters, Inc. Defendant was held to be "doing business" in New York. General Elec. Co. v. Masters Mail Order Co., 122 F. Supp. 797 (S.D.N.Y. 1954).

4. N.Y. GEN. BUS. LAW § 369 provides: "Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any [lawful fair-trade] contract . . . whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

5. General Elec. Co. v. Masters Mail Order Co., 145 F. Supp. 57 (S.D.N.Y. 1956).

6. 66 STAT. 632, 15 U.S.C. § 45(a)(3) (1952).

7. Chief Judge Clark based this aspect of his opinion on the theory that title to the purchased goods passed in Washington; Judge Waterman, concurring in the judgment, indicated that the "situs" of the seller was controlling in determining the place of sale. Judge Lombard dissented, adopting the view that the contract of sale was formed in New York and that hence the resale occurred there.

8. Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951); Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

9. A state law authorizing enforcement of fair-trade agreements in a manner not permitted by the federal enabling act would be invalid to that extent as conflicting with an act of Congress under the supremacy clause. U.S. CONST. art. VI, cl. 2.

Miller-Tydings Amendment.[10] This amendment, however, was held not to authorize enforcement of fair-trade agreements against non-signers engaged in interstate commerce[11] nor against domestic retailers selling by direct mail-order to out-of-state purchasers.[12] In the McGuire Act,[13] enacted following these decisions, Congress provided that resale price maintenance agreements for products in free and open competition shall not violate any antitrust act[14] nor constitute an unlawful burden on interstate commerce[15] if such agreements are lawful with respect to intrastate transactions under the law of the jurisdiction "in which . . . resale is to be made. . . ."[16] Similar exemption was extended to the enforcement of a right of action authorized by state statute against "willfully and knowingly advertising, offering for sale, or selling any commodity at less than . . . prices prescribed in such contracts. . . ." whether or not the defendant is a party to the contract.[17] The act has been interpreted as authorizing enforcement of resale price agreements in fair-trade states against domestic mail-order vendors selling to out-of-state buyers.[18] But in *Revere Camera Co. v. Masters Mail Order Co.*[19] in which defendant-seller made sales by direct mail-order from the District of Columbia to purchasers in Maryland, a fair-trade jurisdiction,[20] it was held that the

10. 50 STAT. 693 (1937), 15 U.S.C. § 1 (1952).

11. Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951).

12. Sunbeam Corp. v. Wentling, 185 F.2d 903 (3d Cir. 1950), *rev'd on other grounds*, 341 U.S. 944 (1951), *modified*, 192 F.2d 7 (3d Cir. 1951).

13. 66 STAT. 631, 15 U.S.C. § 45 (1952).

14. 66 STAT. 632, 15 U.S.C. § 45(a)(2) (1952): "Nothing contained in this section or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor or such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale."

15. 66 STAT. 632, 15 U.S.C. § 45(a)(4) (1952): "Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unawful burden or restraint upon, or interference with, commerce."

16. 66 STAT. 632, 15 U.S.C. § 45(a)(2) (1952).

17. 66 STAT. 632, 15 U.S.C. § 45(a)(3) (1952): "Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby."

18. Sunbeam Corp. v. Macmillan, 110 F. Supp. 836 (D. Md. 1953); Raxor Corp. v. Goody, 121 N.Y.S.2d 882 (Sup. Ct. 1953), *aff'd*, 307 N.Y. 229, 120 N.E.2d 802, *cert. denied*, 348 U.S. 863 (1954).

19. 128 F. Supp. 457 (D. Md. 1955).

20. MD. ANN. CODE art. 83, § 107 (1951), identical to the New York statute in all respects material here.

McGuire Act does not empower the states to prohibit delivery within their borders of merchandise purchased in such manner, and that the law of the place of sale should govern the enforceability of fair-trade agreements. Defendant's activities in the fair-trade jurisdiction consisted solely of introducing advertising matter by mail and other media and the subsequent delivery of goods ordered by direct mail communication. Deeming that defendant's business was conducted "from Washington, D. C.," the court held that the sales were concluded in that jurisdiction and therefore not within the proscription of the laws of the fair-trade state. On the same facts a second attack was made on defendant Masters Mail Order Co. in *Bissell Carpet Sweeper Co. v. Masters Mail Order Co.*[21] in which it was argued that advertising at cut-rate prices is a separate disruptive evil to fair-trade price maintenance and constitutes a violation of the state fair-trade law. Rejecting this theory, the court held that the Maryland act's prohibition of "advertising or offering for sale" [22] relates only to a sale to be concluded within the jurisdiction and that the *Revere* case was controlling.[23] In the instant case the same result was reached as in *Revere* and *Bissell* although defendant not only advertised in the fair-trade jurisdiction, but also solicited orders there through the employees of its parent.

So long as the parties to a sales transaction are both within the same fair-trade jurisdiction, no problem arises in determining where the "resale is . . . made" within the meaning of section 5(a)(2) of the McGuire Act. However, when the sale involves a free-trade state seller and a fair-trade state buyer, the method of determining where the sale is made becomes crucial. The act itself provides no clue [24] nor is the legislative history of the bill of substantial aid. Some aspects of the history indicate that Congress intended that fair-trade agreements may be enforced against

21. 140 F. Supp. 165 (D. Md. 1956), *aff'd*, 240 F.2d 684 (4th Cir. 1957).

22. MD. ANN. CODE art. 83, § 107 (1951); see also McGuire Act, 66 STAT. 632, 15 U.S.C. § 45(a)(3) (1952) set forth at note 17 *supra*.

23. Focusing on the publicity aspects of the defendant's business, the court said that advertising alone constituted only a statement of fact indicating the advantages and opportunities to be obtained in another jurisdiction, that the Maryland act did not intend to so suppress freedom of expression, nor did the McGuire Act authorize such action. In addition, when the retailer's only contact with the fair-trade state is through mailed advertising and deliveries, as in the *Revere* and *Bissell* cases, corallary problems of enforcement are also presented. Mere advertising in a jurisdiction has been held to be insufficient basis for service of process, Trans World Airlines v. Curtiss-Wright Corp., 119 N.Y.S.2d 729, 733-34 (Sup. Ct. 1953); McGriff v. Charles Antell, 256 P.2d 703 (Utah 1953), and the courts of free trade jurisdictions possibly will refuse to apply fair-trade laws of their sister states as against public policy of the forum of enforcement although this aspect of "full faith and credit" has not yet been litigated with regards to fair-trade legislation. See Cook, *The Continuing Fair Trade Battle*, 29 ST. JOHN'S L. REV. 66, 83 (1954). This issue was not present for determination in the *Revere* and *Bissell* cases because defendant was incorporated in Maryland at the time of commencement of these actions. This corporation was subsequently disbanded and reincorporated in the District of Columbia. It should be noted that in view of the multi-jurisdictional circulation enjoyed by major advertising media, a mail-order advertiser in the free-trade jurisdiction might inescapably find himself violating the law of neighboring fair-trade states. See Note, 17 MD. L. REV. 148, 152 (1957).

24. See notes 14, 15 and 17 *supra*.

out-of-state mail-order houses competing with local vendors,[25] thus suggesting a construction of "resale" broad enough to reach a transaction even though only certain of its elements occur in the fair-trade jurisdiction. On the other hand, the House rejected the Cole Amendment [26] which would have made it an "act of unfair competition . . . to willfully and knowingly . . . deliver pursuant to a sale, or otherwise deliver . . . [a fair-traded] commodity in any . . . State, Territory, or the District of Columbia, where such a contract or agreement is lawful, at less than the price or prices so established in such contract or agreement." [27] The members of the court in the instant case adopted three different methods of determining the place of resale: where title passed,[28] where the seller was located,[29] and where the contract was formed.[30] No one of the three seems to offer a completely satisfactory solution.

Acceptance of the title theory in effect is a determination that the out-of-state vendor may not be enjoined from his activities, since the place where title passes may be determined by the parties to the sale who will, of course, select the place in which a less than fair-trade price sale is possible.[31] Even if the intention of the parties does not appear and is not implied from the fact that they wish to make a less than fair-trade price sale, passage of title depends upon terms of the contract,[32] for example, payment of freight charges,[33] variance of which bears no relation to the ultimate fact giving rise to the controversy, namely, that an out-of-state dealer is selling into a fair-trade state. The contract theory is open to similar objections. Under this view the sale is effected at that place where the contractual "offer" is "accepted." [34] Defendant's mail-order blank, for example, stated that orders were to be accepted in the District of

25. See remarks of Senator Humphrey that the act will have the effect "that where there are trade or branded names on which fair-trade prices have been established the mail-order-house will sell them at those prices in any state, just as the local retail man is required to do." 98 CONG. REC. 8887 (1952). See also instant case, 145 F. Supp. 57, 62 (S.D.N.Y. 1956).

26. 98 CONG. REC. 4954 (1952).

27. *Id.* at 4952. Although this amendment was opposed on its merits, see remarks of Congressman Patman, 98 CONG. REC. 4953 (1952), it was further opposed on the ground that it created a federal cause of action. *Id.* at 4954.

28. See instant case, opinion of Chief Judge Clark, 244 F.2d 681, 685 (2d Cir. 1957).

29. See instant case, opinion of Judge Waterman, *id.* at 689-90.

30. See instant case, opinion of Judge Lombard, *id.* at 691; district court opinion, 145 F. Supp. 57, 61 (S.D.N.Y. 1956).

31. It should be noted that under such a theory the application of fair-trade legislation to domestic mail-order vendors selling to out-of-state buyers in free-trade jurisdictions would also no longer be possible. See instant case, 244 F.2d 681, 690 (2d Cir. 1957).

32. Where the terms of the contract are "F.O.B. seller's place of business," title generally passes at the seller's warehouse. UNIFORM SALES ACT § 19, rule 5. Although the seller's price indicated a single item and the order form indicated "No Charge For Shipping," Chief Judge Clark finds that the cost of shipping is invariably included in a seller's price, thus "passed on to the . . . consumer," thus indicating the prepayment necessary for this conclusion; instant case, 244 F.2d 681, 685 (2d Cir. 1957).

33. WILLISTON, SALES § 263 (rev. ed. 1948).

34. *Ibid.*

Columbia. But the court may, as the dissent in the instant case did, look through the statements of the parties to what it considers to be the "realities" of the transaction and find that the mail-order seller's advertisements in fact constitute offers to be accepted by the buyer when he mails in his order. Any application of the contract or title theories appears unrealistic in that those theories focus on legal fictions created to resolve such questions as remedy and risk of loss rather than focusing directly on resolution of the conflict between fair-trade and fair-trade policies created by the mail-order transaction.

The location theory adopted by the concurring judge in the instant case escapes this difficulty. It posits that the sale takes place where the seller is located and determines where the seller is located by balancing his activities in the free-trade state against his activities in the fair-trade state. If a sufficient part of his activity is in the fair-trade state, then the sale becomes subject to the jurisdiction of that state and may be enjoined. Aside from the problem of determining how much activity will be necessary before invoking the fair-trade state's jurisdiction, this approach also suffers from requiring an all-or-nothing determination; once the seller's location is fixed as being in the free-trade state no part of its activity in the fair-trade state is subject to that state's control and vice versa.

It would seem that the word "resale" must be so construed as to be a useful tool in resolving the conflict between free-trade and fair-trade policies engendered by the mail order transaction. That Congress chose to exempt enforcement of fair-trade agreements from the antitrust laws only in those jurisdictions adopting fair-trade legislation demonstrates an intent not to impose fair-trading upon those states not desiring it. In the case of transactions, some aspects of which are in a fair-trade state and other aspects of which are in a free-trade state, conflict between the two policies is inevitable. To ban the transaction, thus effectuating the fair-trade policy, is to affront the policy of the interested free-trade jurisdiction. And yet to permit the transaction, of course, conflicts with the fair-trade policy. There appears, however, to be a middle ground. Defendant's mail order transaction in the instant case was a composite of advertising in New York, solicitation of customers by the New York parent's employees, mailing of order forms to the District of Columbia by New York customers, processing and filling of the orders in the District of Columbia by defendant, and delivery of the ordered merchandise to New York customers by mail. That portion of the transaction most offensive to the New York fair trade policy would seem to be the active solicitation of New York customers by employees of defendant's New York parent. By conducting its mail order business in this manner, defendant differs from New York retailers only in that delivery is made from the District of Columbia by mail. It has the benefit of display facilities and personal contact with potential customers to entice them to purchase. In order to balance fair-trade with free-trade interests, it would seem desirable to hold that this much of defendant's activity constituted a resale within the meaning of the McGuire

Act and thus could be enjoined by New York while leaving the remainder of defendant's mail order business free from restraint as in *Revere*[35] and *Bissell*[36]—defendant would be permitted to advertise both through the mails and in other manner and would be permitted to fill orders solicited through this means. Such a ruling would serve fair-trade policy to the extent that it bars New York retailers from escaping the ban of New York law by establishing what amounts to incorporated warehouses in a free-trade jurisdiction, and would at the same time serve free-trade policy by permitting mail-order businesses established in free-trade jurisdictions to solicit business in fair-trade states through means typical of the mail-order business rather than of local retailing.

35. 128 F. Supp. 457 (D. Md. 1955).

36. 140 F. Supp. 165 (D. Md. 1956), *aff'd*, 240 F.2d 684 (4th Cir. 1957).